Beena Beauty Holding, Inc. d/b/a Planet Beauty *and* Michael Sanchez. Case 31–CA–144492

May 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On March 3, 2016, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions with supporting argument, and the Respondent filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration/dispute resolution provision in its commission agreement—sales (the Agreement) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), that maintaining the Agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practices with the Board.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and, based on the judge's application of *D. R. Horton* and *Murphy Oil*, we affirm the judge's rulings, findings, and conclusions,[1] modify her remedy,[2] and adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Beena Beauty Holding, Inc. d/b/a Planet Beauty, Studio City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing the arbitration/dispute resolution provision in its commission

[1] To the extent the Respondent and our dissenting colleague argue that Charging Party Michael Sanchez was not engaged in concerted activity in filing the state wage-and-hour class action lawsuit in state superior court and that Sec. 7 does not guarantee any substantive right of employees to pursue collective legal action, we reject these arguments. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2278.

The Respondent and the dissent further argue that *D. R. Horton* and *Murphy Oil USA, Inc.* were wrongly decided and should be overruled. We agree with the judge's rejection of those arguments, and adhere to the findings and rationale in those cases.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2014), observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

We reject our dissenting colleague's view that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U. S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil,* supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[2] We agree with the judge that, if the lawsuit is still pending, the Respondent is required to notify the court that it has rescinded or revised the Agreement and to inform the court that it no longer opposes the lawsuit on the basis of the Agreement. Consistent with our decision in *Murphy Oil*, 361 NLRB No. 72, slip op. at 21, we modify the judge's recommended remedy to order the Respondent to reimburse Michael Sanchez *and any other plaintiffs* for all reasonable expenses and legal fees, with interest, incurred in connection with opposing the Respondent's unlawful efforts to dismiss the class action lawsuit and compel individual arbitration.

[3] We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language. We shall substitute a new notice to include the missing affirmative provisions, as argued by the General Counsel on cross exception, and to conform to the Order as modified.

agreement—sales that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining the arbitration/dispute resolution provision in its commission agreement—sales that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the arbitration/dispute resolution provision in its commission agreement—sales in all of its forms, or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the arbitration/dispute resolution provision in its commission agreement—sales in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class, or collective actions in all forums.

(c) Notify the Superior Court of the State of California, in Case BC566065, if that case is still pending, that the Respondent has rescinded or revised the commission agreement—sales upon which it based its motion to compel arbitration and dismiss class claims, and inform the court that it no longer opposes the lawsuit on the basis of the agreement.

(d) In the manner set forth in the remedy section of the judge's decision, as further amended in this decision, reimburse Michael Sanchez and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's attempts to dismiss the class action lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Studio City, California facility copies of the attached notice marked "Appendix."[4] Copies of the notices, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since April 2, 2013, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since April 2, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Arbitration/Dispute Resolution Agreement (Agreement) contained in the Respondent's Commission Agreement—sales violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because it waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Michael Sanchez signed the Agreement, and later he filed a class action lawsuit against the Respondent in state court alleging violations of the California Labor Code and Business and Professions Code. In reliance on the Agreement, the Respondent filed a motion to compel arbitration and

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dismiss class claims, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced its Agreement.

I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] For the reasons stated below, however, I agree with my colleagues' finding that the Agreement unlawfully interferes with the right of employees to file unfair labor practice charges with the Board.

1. The class-waiver agreement

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the arbitration and class-waiver language in the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to en-

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, the Charging Party was not engaged in concerted activity when, acting individually, he filed a class action lawsuit in California State court. See my dissent in *Beyoglu*, above.

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

force the Agreement.[7] It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by court decisions that have enforced similar agreements.[8] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[9] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. Unlawful interference with Board charge filing

I concur in my colleagues' finding that the Agreement unlawfully interferes with NLRB charge filing in violation of Section 8(a)(1), although I believe this presents a relatively close question here. The Agreement, in pertinent part, states that the employee and the Company agree to "resolve and binding [sic] arbitration" any claim that, "in the absent [sic] of agreement, *would be resolved in a court of law* under applicable state or federal law" (emphasis added). On its face, this language would seemingly exclude from arbitration alleged unfair labor practice claims that might be filed with the Board, since the Board is not a "court of law." I need not address whether this distinction is sufficient to prevent the Agreement from unlawfully encroaching on Board charge filing, however, because other language in the Agreement could reasonably be understood to preclude the filing of a Board charge. For example, in the sentence immediately following the "court of law" reference, the Agreement provides a different description of coverage: "The claims governed by this agreement are *those that you or the company may have relating to your employment with, behavior during, or termination from, the Company*" (emphasis added). Subsequently, the Agreement also states (in all capital letters) that "the Company and you agree . . . to submit *any claims that either has against the other* to final and binding arbitration" (emphasis added). It is a standard principle of contract construction that an agreement's provisions are to be construed in conjunction with one another. Yet, in consideration of the above provisions, I believe there is a substantial question, which employees cannot reasonably resolve by themselves, about whether covered claims are limited to those that would be decided by a "court of law," whether they include all "those that you or the company may have relating to your employment," or whether they include all "claims that either [the employee or the Company] has against the other. . . ." For this reason, and given that many individuals would not understand the difference between the Board and a "court," *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007), I believe the Agreement arguably requires arbitration of claims that would be within the Board's jurisdiction.

This does not end the inquiry because, in my view, merely providing for the arbitration of NLRA claims does not necessarily mean that an agreement precludes NLRB charge filing. As stated in my separate opinion in *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. However, the Agreement not only arguably requires arbitration of all matters that would be within the Board's jurisdiction (again, I believe this is a close question), the Agreement also contains an exclusion that places outside the Agreement's coverage only "[c]laims for workers compensation or unemployment

[7] As I explain below, I concur in my colleagues' finding that the Agreement unlawfully interfered with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the Agreement in this regard is not material to the merits of the Respondent's state-court motion to compel the Charging Party to arbitrate his non-NLRA claims. See *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

[8] See, e.g., *Murphy Oil USA, Inc. v. NLRB,* above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D.R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[9] *Murphy Oil USA, Inc. v. NLRB,* 808 F.3d at 1021.

compensation benefits," with no reference to the exclusion of claims or complaints filed with administrative agencies generally or the NLRB in particular. In short, the Agreement can be interpreted as requiring that all employment-related claims be resolved in binding arbitration and in this manner only, and without some further qualification, this would preclude the filing of a Board charge.

Accordingly, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting employees' right to file charges with the Board. See *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6–7 (2015) (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, above (Member Miscimarra, dissenting in part).

CONCLUSION

Accordingly, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. May 23, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the arbitration/dispute resolution provision in our commission agreement—sales that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain the arbitration/dispute resolution provision in our commission agreement—sales that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the arbitration/dispute resolution provision in our commission agreement—sales in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration/dispute resolution provision in our commission agreement—sales in any form that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement, and WE WILL further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify the Superior Court of the State of California, in Case BC566065, if that case is still pending, that we have rescinded or revised the commission agreement—sales upon which we based our motion to compel arbitration and dismiss class claims, and inform the court that we no longer oppose the lawsuit on the basis of the agreement.

WE WILL reimburse Michael Sanchez and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our attempts to dismiss the class action lawsuit and compel individual arbitration.

BEENA BEAUTY HOLDING, INC. D/B/A PLANET BEAUTY

The Board's decision can be found at www.nlrb.gov/case/31-CA-144492 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Renée M. Medved, Esq., for the General Counsel.
Jeffrey S. Ranen, Esq., and Victoria Lin, Esq., for Respondent.
Nicholas De Blouw, Esq., for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. Beena Beauty Holding, Inc. d/b/a Planet Beauty (Respondent)[1], maintains an arbitration/dispute resolution provision in its commission agreement-sales (the Agreement) which prohibits class or collective legal claims in all forums, arbitral and judicial, and requires signatory employees to settle any dispute arising out of or relating to their employment with Respondent in accordance with the terms of the provisions of the Agreement. The General Counsel alleges that Respondent's entering into, maintenance, and enforcement[2] of the Agreement with employees violates Section 8(a)(1) of the National Labor Relations Act (the Act).[3] Further, the General Counsel alleges that employees would reasonably construe the language used in the Agreement to preclude them from filing unfair labor practice charges with the National Labor Relations Board (the Board or NLRB) in violation of Section 8(a)(1).[4] The violations are found as alleged.

On the entire record,[5] and after considering the briefs filed by counsel for the General Counsel and the brief filed by counsel for the Respondent, the following findings of fact and conclusions of law are made.

I. JURISDICTION

Respondent is a corporation with an office and place of business located in Studio City, California where it engages in the retail sale of beauty supplies and related products. During the twelve-month period ending April 7, 2015, it derived gross revenue in excess of $500,000 and during that same period, sold and shipped goods valued in excess of $5000 directly to points outside the State of California. Thus, the parties stipulate and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act. Respondent's claim that this matter is time-barred is rejected.[6]

II. FACTS

A. Arbitration Provision of the Agreement

The parties agree and it is found that since at least April 2, 2013, Respondent has maintained an arbitration provision in the Agreement that prohibits class or collective legal claims in all forums, arbitral and judicial, and requires employees to settle any dispute arising out of or relating to their employment with Respondent in accordance with the terms of the arbitration provision of the Agreement. The parties agree and I find that by signing the Agreement, Sanchez and other commissioned sales employees were required to be bound to the terms of the arbitration provision of the Agreement. There is no evidence that any employee was able to decline or opt out of the arbitration provision of the Agreement.

Paragraph 11 of the Agreement, the arbitration provision,[7] provides,

> The Company ("Planet Beauty and its Affiliates") is committed to provid[ing] the best possible working conditions for employees. However, the Company and its employees recognize that occasionally differences may arise during or following an employee's employment with the Company. By accepting or continuing employment with the [C]ompany, you agree and understand that you and the Company mutually agree to resolve an[y] binding arbitration any claim that, in the absen[ce] of agreement, would be resolved in a court of law under applicable state or federal law. The claims governed by this agreement are those that you or the Company may have relating to your employment with, behavior during or termination from, the Company. Claims for worker compensation or unemployment compensation benefits are not subject to this agreement. By accepting or continuing employment with the [C]ompany, you and the Company both agree to resolve such claims through final and binding arbitration. This includes, but is not limited to, claims of employment discrimination because of race, sex, religion, nation[al] origin, color, age, disability, medical condition, marital status, gender iden-

[1] Filed on January 14 and April 8, 2015, respectively, the unfair labor practice charge and first amended charge in Case 31-CA-144492 were submitted by Charging Party Michael Sanchez (Sanchez), who worked for Respondent from June 2012 to October 2014.

[2] In a civil suit brought against Respondent by Sanchez in state court, Respondent sought to compel arbitration pursuant to the Agreement.

[3] 29 U.S.C. §158(a)(1).

[4] The complaint issued on June 30, 2015. An amendment to the complaint issued on November 6, 2015. Respondent duly filed its answer to the complaint and the amendment to the complaint.

[5] The facts were submitted by stipulation. No credibility resolutions are required on this record.

[6] Sec. 10(b) of the Act provides that an unfair labor practice charge must be filed within six months of the alleged misconduct. Respondent claims that the complaint is time barred because it was filed more than six months from the date Sanchez signed the Agreement. However, it is undisputed that Respondent continued to maintain the Agreement during the six-month period preceding the filing of the initial charge. Under these circumstances, maintenance of the Agreement constitutes a continuing violation that is not time-barred by Sec. 10(b). See *Cowabunga, Inc.,* 363 NLRB No. 133, slip op. 2–3 (2016), citing *PJ Cheese, Inc.,* 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group,* 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27, slip op. at 2 fn.7 (2015).

[7] In its original form, the Agreement contains minor errors which, for ease of understanding, have been corrected in brackets. The brackets replace the following: "provide" is replaced by "provid[ing];" "company" by "[C]ompany" to conform with otherwise uniform capitalization of that word; "and" by "an[y];" "absent" by "absen[ce];" "nation" by "national;" "company" by "[C]ompany" to conform with otherwise uniform capitalization of that word;

> tity, sexual preference or any other characteristic protected by law. It also includes any claim you might have for unlawful harassment including sexual harassment and unlawful retaliation; any claims under contract or tort law; any claims for wages, compensation or benefits; any claim for trade secret violations, unlawful competition or breach of fiduciary duty. Each party may be represented by an attorney and each party shall bear the expenses of its/his/her own attorney's fees and costs, experts, witnesses, and the preparation and presentation of evidence. The Company will pay all types of costs that are unique to arbitration. The Company shall be entitled to recover any costs paid if it prevails at the arbitration.[8] . . . This Agreement does not create a contract of employment and does not in any way change the "At-Will" status of your employment. You and the Company hereby agree that this agreement shall survive the termination of your employment with the Company. THE COMPANY AND YOU AGREE TO GIVE UP ANY RIGHT TO A TRIAL BY JURY AND RIGHT TO APPEAL AND TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBITRATION. YOU ALSO AGREE TO WAIVE YOUR RIGHTS TO PARTICIPATE IN A CLASS ACTION OR BE NAMED AS CLASS REPRESENTATIVES. Your signature below acknowledges that you have been given sufficient time to read & understand this agreement. Your signature further certifies that you have had the opportunity to consult with legal counsel prior to executing this agreement.
>
> I acknowledge that I have received a copy of this Commission Agreement. I have read, understood and agree to the terms and conditions set forth under this Agreement.

Employee Name	Employee Signature	Date Signed
Planet Beauty Representative	Manager's Signature	Date Signed

Paragraph 10 of the Agreement provides, that,

> This contract will be effective on [date of hire to be filled in here] and will be in effect for 6 months from the effective date unless a new contract is signed to supersede it. This contract will supersede all other contracts previously signed and agreed upon by the employee and employee representatives. An expired contract is presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party. This contract can be canceled at any time by either party given a 2 month notice.

B. Wage and Hour Class Action

On December 9, 2014, after his separation from employment with Respondent, Sanchez filed a wage and hour class action suit against Respondent in the Superior Court of the State of California, County of Los Angeles (Superior Court). By letter of December 30, 2014, Respondent informed Sanchez that the arbitration/dispute resolution provision of the Agreement prohibited bringing the class action complaint. Thereafter, on March 6, 2015,[9] Sanchez filed a first amended class action complaint.

By motion of March 31, Respondent sought to compel individual arbitration of the class action wage and hour claims. Sanchez filed opposition to the motion to compel on April 23. Respondent withdrew its motion to compel individual arbitration and on April 30, it re-filed its motion to compel individual arbitration. On May 18, Sanchez filed an opposition and Respondent's reply brief was filed June 1.

By order of June 22, the Superior Court found in favor of Respondent on the motion to compel arbitration. By order of August 25, the Superior Court dismissed Sanchez's class claims without prejudice, giving him 60 days to find a qualified class representative. Although the court granted Sanchez 60 days to find a suitable class representative not subject to arbitration, Sanchez was unable to find a class representative who had not signed the Agreement's arbitration provision.

III. ANALYSIS

A. Entering into and Maintenance of the Agreement

In both *D. R. Horton,*[10] and *Murphy Oil*,[11] the Board held that an employer violates the Act when it requires employees, as a condition of their employment, to sign an agreement waiving their right to file joint, class, or collective claims regarding wages, hours or working conditions against their employer in any forum, arbitral or judicial. As the General Counsel points out, this holding has been extended to include agreements that were voluntarily entered into as well.[12]

Respondent claims that *D. R. Horton* and *Murphy Oil* were wrongly decided relying on (1) *D. R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir 2013) (arbitration agreements containing class action waivers are enforceable); (2) the Federal Arbitration Act (FAA)[13] as interpreted in *AT&T Mobility LLC v. Concepcion,* 131 S.Ct 1740, 1746 (2011) (rule neutral on its face but applied in a fashion that disfavors arbitration is not grounds for revocation of any contract within meaning of savings clause of FAA); (3) *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013) (class action waiver must be enforced according to its terms in the absence of a contrary Congressional command); (4) lack of inherent conflict between the NLRA and the FAA in that individual arbitration agreements have no effect on any collective-bargaining obligations under

[8] Procedures for selection of an arbitrator, applicable local laws, timing of award, action to enforce arbitration or arbitration award are omitted here.

[9] All subsequent dates are in 2015 unless otherwise referenced.

[10] *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014).

[11] *Murphy Oil USA, Inc.,* 361 NLRB No. 72, slip op. at 2 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

[12] *On Assignments Staffing Services, Inc.,* 362 NLRB No. 189, slip op. at 7 (2015), citing *J. I. Case v. NLRB,* 321 U.S. 332, 338 (1944) (individual arbitration agreements that would prevent employees from engaging in concerted legal activity must yield to the Act whether or not they were a condition of employment).

[13] 9 U.S.C. § 2.

the NLRA; (5) inapplicability of the Norris-LaGuardia Act (NLGA)[14] because the Agreement is not illegal under the NLGA and does not constitute a prohibited "yellow dog contract." These arguments are rejected for the reasons set forth in *D. R. Horton* and *Murphy Oil.* Further, as the General Counsel notes, citing *On Assignment Staffing Services, Inc.,* 362 NLRB No. 189, slip op. at 12 (2015), the Board is the agency with primary responsibility for developing and applying national labor policy and need not apologize for adopting positions firmly grounded in Board precedent, Supreme Court decisions, and federal statutes.

Nevertheless, it is clear that the provisions of the Agreement require employees to agree to the arbitration provision as a condition of their employment. There is no opt-out provision and the literal provision states that by accepting or continuing employment, the employee agrees to resolve covered claims through binding arbitration. There is no evidence of employees opting out. The employee's signature to the entire Agreement is immediately below the arbitration provision. Moreover, as noted by counsel for the General Counsel, in the state court class action suit filed by Sanchez, Respondent argued in support of its motion to compel individual arbitration that employers may condition employment on execution of an arbitration agreement and that its arbitration agreement met California's heightened enforceability standards for mandatory employment arbitration agreements which are imposed as a condition of employment.[15] Thus, it must be concluded that the arbitration agreement constitutes a condition of employment.

The parties agree that Respondent's arbitration provision prohibits class or collective legal claims in all forums, arbitral and judicial, and requires that employees settle any dispute arising out of or relating to their employment with Respondent in accordance with the Agreement. Thus, Respondent's arbitration requires that employees waive their right to participate in a class action and agree to submit all employment claims except workers compensation and unemployment claims to final and binding arbitration. It is found that the arbitration provision precludes concerted legal activity, a substantive right under Section 7 of the Act, and violates Section 8(a)(1) of the Act.

B. Enforcement of Arbitration Provision in Class Action Suit

Relying on the Agreement's arbitration provision, Respondent sought and was granted enforcement of individual arbitration for Sanchez's individual claims. It is clear that by seeking to enforce its arbitration provision in the class action lawsuit, Respondent sought to restrain Sanchez statutory right to pursue concerted legal action.[16] Accordingly, I find that by seeking enforcement of the Agreement's arbitration provision in Sanchez's wage and hour class action litigation, Respondent violated Section 8(a)(1) of the Act.

C. Access to the Board

In *Ralph's Grocery Co.,* 363 NLRB No. 128 (2016), the Board stated:

> "Preserving and protecting access to the Board is a fundamental goal of the Act," and so the Board must carefully examine employer rules that may interfere with this goal. *SolarCity,* 363 NLRB No. 83, slip op. at 4 [(2015)]. In turn, the Board recognizes that "rank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint." Id., slip op. at 5, quoting *Ingram Book Co.,* 315 NLRB 515, 516 fn. 2 (1994).

Examination of the arbitration provision under these precepts reveals that it does not explicitly prohibit employees from filing unfair labor practice charges with the NLRB. Nevertheless, employees would reasonably construe the language of the arbitration provision to prohibit such action. Thus, work rules which do not explicitly restrict Section 7 activities may nevertheless violate the Act if employees would reasonably construe the rule as prohibiting Section 7 activity.[17] With the specific exemption of workers compensation and unemployment compensation claims, Respondent's arbitration provision requires employees to agree to pursue any claim that could be resolved in court under state or federal law including employment-related claims by utilizing final and binding individual arbitration. There is no language in the agreement that exempts claims of unfair labor practices. It is reasonable, accordingly, to construe the language of the provision to prohibit the filing of unfair labor practice charges with the NLRB.[18] Respondent argues, however, that the language of the Agreement applies only to those claims that "would resolve in a court of law under applicable state or federal law." Respondent avers that this language does not apply to claims brought in administrative proceedings before the Board because it is not a court of law and thus employees would reasonably understand that NLRB proceedings are not implicated. As the General Counsel correctly notes,[19] however, this argument is not viable because the

[14] 29 U.S.C. § 102.

[15] See *Amendariz v. Foundation Health Psychare Services, Inc.,* 24 Cal. 4th 83, 4 P.3d 669 (Cal SCt 2000) (In state law antidiscrimination class action, court held mandatory arbitration as a condition of employment allowable only where the agreement insured neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration. Holding the arbitration agreement was unenforceable, the court found it unconscionably unilateral and did not allow full vindication of statutory rights).

[16] See *Murphy Oil,* supra, slip op. at 5, 19 (mandatory arbitration agreements that bar employees from bringing joint, class, or collective claims restrict the exercise of the substantive right to act in concert for mutual aid and protection; enforcement of such a mandatory rule through motion to dismiss collective legal action unlawfully restricts Sec. 7 rights).

[17] *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004): A work rule may be found unlawful if it explicitly restricts Section 7 activity or (1) employees would reasonably construe the rule as prohibiting Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity.

[18] See, e.g., *U Haul Co.,* 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007).

[19] The General Counsel cites *U-Haul,* supra at 378 (language exempting claims which would be resolved in a court of law is insufficient to cure defects in the policy).

Board has held that non-lawyer employees would not be familiar with the intricacies of federal court jurisdiction. Thus, it is found that by maintaining the Agreement, which is reasonably construed as prohibiting access to the Board, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By entering into and maintaining the arbitration/dispute resolution provision of its commission agreement—sales, which prohibits class or collective action in all forums, arbitral and judicial, and requires employees to settle any dispute arising out of or relating to their employment with Respondent in accordance with the terms of the arbitration provision, Respondent has engaged in unfair labor practices within the meaning of Section 2(2), (6), and (7) of the Act and has violated Section 8(a)(1) of the Act.

2. By taking actions to enforce the arbitration/dispute resolution provision of its commission agreement—sales in the Los Angeles Superior Court class action litigation, Sanchez v. Planet Beauty, Inc., Case No. BC566065, specifically by letter of December 30, 2014, by its March 31 and April 30 motions to compel arbitration and briefs in support of these motions, Respondent has violated Section 8(a)(1) of the Act.

3. By maintaining the arbitration/dispute resolution provision of its commission agreement—sales, which is reasonably interpreted as precluding employees from filing unfair labor practice charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, Respondent must reimburse Sanchez for all reasonable expenses and legal fees, with interest,[20] incurred in opposing Respondent's unlawful letter and motions to compel individual arbitration. Respondent shall also be ordered to rescind or revise the Agreement, notify employees and the Los Angeles Superior Court that it has done so and that it will no longer oppose the lawsuit on the basis of the Agreement. Respondent must also rescind or revise the Agreement to make clear to employees that its Agreement does not constitute a waiver of the right to maintain employment-related joint, class, or collective actions and that it does not bar or restrict employees right to file charges with the NLRB.

[20] Interest shall be computed in the manner prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 747 (1983) (If a violation is found, the Board may order the employer to reimburse the employees who he had wrongfully sued for their attorneys' fees and expenses as well as any other proper relief that would effectuate the policies of the Act); *Teamsters Local 776 (Rite Aid),* 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

ORDER

Respondent, Beena Beauty Holding, Inc. d/b/a Planet Beauty, Studio City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Entering into and maintaining its commission agreement—sales arbitration/dispute resolution agreement with employees that prohibits class or collective legal claims in all forums, arbitral and judicial, and requires signatory employees to settle any dispute arising out of or relating to their employment with Respondent in accordance with the terms of the arbitration provision.

(b) Enforcing its commission agreement—sales through letters, motions, and briefs seeking to compel arbitration in response to a wage and hour class action civil suit brought against it in state court.

(c) Maintaining the commission agreement—sales arbitration/dispute resolution agreement which is reasonably understood to preclude employees from filing unfair labor practice charges with the NLRB.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the arbitration/dispute resolution provision of its commission agreement—sales in all of its forms or revise it in all of its forms to make clear to employees that the provision does not prohibit class or collective legal claims in all forums, arbitral and judicial, and does not require signatory employees to settle any dispute arising out of or relating to their employment with Respondent in accordance with the terms of the arbitration provision.

(b) Rescind the arbitration/dispute resolution provision of its commission agreement—sales in all of its forms or revise it in all of its forms to make clear to employees that the provision does not prohibit access to the NLRB to file unfair labor practice charges.

(c) Notify all current and former employees who signed the Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(d) Notify the Los Angeles Superior Court of California that it has rescinded or revised the arbitration/dispute resolution provision of its commission agreement—sales upon which it based its motions to compel individual arbitration and seek reinstatement of the lawsuit upon that basis, informing the court that it no longer seeks to compel individual arbitration of the lawsuit on the basis of the Agreement and move the court jointly with Sanchez to vacate its order compelling arbitration.

(e) In the manner set forth in the remedy section of this decision, reimburse Sanchez for any reasonable attorneys' fees and litigation expenses, with interest, that he may have incurred in opposing Respondents attempts to dismiss the lawsuit and compel individual arbitration.

(f) Within 14 days after service by the Region, post at its Studio City, California facility copies of the attached notice

marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including places where notices are customarily posted. In addition to physical posting or paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since July 14, 2014, and any employees against whom Respondent has enforced its mandatory arbitration agreement since July 14, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 3, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enter into and maintain the arbitration/dispute resolution provision of our commission agreement—sales, which prohibits class or collective action in all forums, arbitral and judicial and requires employees to settle any dispute arising out of or relating to their employment with us in accordance with the terms of the arbitration provision.

WE WILL NOT take actions to enforce the arbitration/dispute resolution provision of our commission agreement—sales in the Los Angeles Superior Court class action litigation, Sanchez v. Planet Beauty, Inc., Case No. BC566065, specifically by letter of December 30, 2014, by our March 31 and April 30 motions to compel arbitration and our briefs in support of these motions.

WE WILL NOT maintain the arbitration/dispute resolution provision of our commission agreement—sales, which is reasonably interpreted as precluding you from filing unfair labor practice charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law.

WE WILL reimburse Sanchez for all reasonable litigation expenses and legal fees with interest directly related to our motions to compel individual arbitration and expenses.

WE WILL withdraw our letter, motions to compel individual arbitration, and briefs in support of those motions and move the Los Angeles Superior Court, jointly with Sanchez, to vacate its order compelling arbitration.

BEENA BEAUTY HOLDING, INC. D/B/A PLANET BEAUTY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-144492 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.